87-1813

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES GRIFFIN, PETITIONER

v.

UNITED STATES, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER ADMISSION OF A WITNESS'S EXTRA-JUDICIAL STATEMENT INTO EVIDENCE IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS SIGNIFICANT PREJUDICIAL ERROR OF CONSTITUTIONAL DIMENSION, UNSALVAGEABLE BY HARMLESS ERROR ANALYSIS

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

JAMES GRIFFIN, PETITIONER

v.

UNITED STATES, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

James Griffin respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on March 7, 1988.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review was issued on September 5, 1985. The decision of the United States Court of Military Appeals was issued on March 7, 1988.

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h) (Supp III 1985) and 28 U.S.C. § 1259(3) (Supp III 1985). The judgment of the Court of Military Appeals was entered on March 7, 1988.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

STATEMENT OF THE CASE

Petitioner was tried by general court martial before officer and enlisted members at McChord Air Force Base, Washington. Contrary to his pleas, he was found guilty of rape.

Petitioner was sentenced to a dishonorable discharge and to confinement for five years. The convening authority approved the sentence as adjudged on March 1, 1985. On September 5, 1985, the Air Force Court of Military Review affirmed the findings of guilty and the sentence as approved. (Appendix B). The United States Court of Military Appeals granted review of the case on December 23, 1986 and affirmed the findings and sentence on March 7, 1988.

Petitioner was alleged to have raped Airman First Class Hurst in Pierce County, Washington, near McChord Air Force Base. Petitioner and A1C Hurst met for the first time at the McChord Air Force Base passenger terminal on July 8, 1984 (R. 248, 250, 614). Petitioner was enroute to Sacramento, California, from Korea where he had been visiting. Petitioner was in a terminal leave status and was scheduled to retire from active duty on July 31, 1984 (R. 611-612). Petitioner's last duty station was Beale Air Force Base, California (R. 611). Petitioner had not previously been in Pierce County or the local area around McChord Air Force Base (R. 615). A1C Hurst was on leave, having been in Idaho for two weeks, and was on her way to her assigned duty station on Okinawa, Japan (R. 250). She had not been to McChord Air Force Base, nor had she been in Pierce County, Washington, before (R. 421).

After meeting in the McChord passenger terminal during a layover between flights, petitioner and A1C Hurst went off base to a motel and agreed to share a room and

the cost (R. 255). They rented a room at the Ft. Lewis Motel where the rape was alleged to have occured several hours later.

A1C Hurst testified that after returning to the Ft. Lewis Motel on the night of July 8, 1984, she learned that petitioner was not leaving until the following morning (R. 265). She then left the motel room to call a taxi and returned to the room (R. 266-267). When she heard a horn blow outside, she thought the taxi had arrived and started to collect her luggage (R. 267). However, she stated that petitioner went outside the room, returned back inside, closed the door and stood in front of it (R. 267). She managed to open the door to attempt to leave, but petitioner shoved her away from the door and closed it again (R. 267). Petitioner testified that A1C Hurst never left or tried to leave the room before they had sexual intercourse as she claimed to have (R. 651).

At trial, the following out-of-court statement of Mrs. Kwang Sun Bordoy was admitted over defense objection as Pros. Exh. 2:

> I arrived at McChord Air Force Base, Washington, at approximately 1:00 P.M., 8 Jul 84, with my husband and daughter. We are on leave awaiting air transportation to Korea.
>
> Sometime after I put my baby to bed at approximately 10:30 the night of 8 Jul 84, I heard a scream from the apartment area. I then saw a black man push a white woman into apartment 17. I then went to my husband and told him what I saw. I told him I thought the girl was being raped. She kept screaming for about 10 minutes or so. She finally came running out of the apartment and went over to a taxi driver. Shortly after that the police arrived.

> This all happened at the Ft. Lewis Motel, Tacoma, Washington. We were staying in room 6. Room 17 is almost directly across from our room.

The defense specifically objected to the admission of this statement on the grounds that the government had not made a reasonable effort to procure the presence of Mrs. Bordoy and that admission of the statement would deny petitioner his Sixth Amendment right to confront witnesses against him (R. 50). The military judge ruled that the statement was admissible under Military Rule of Evidence 804(b)(5). The Air Force Court of Military Review found that the military judge erred by admitting the statement, but concluded that the error was harmless. *United States* v. *Griffin*, 21 M.J. 501 (A.F.C.M.R. 1985) (Appendix B).

REASON FOR GRANTING WRIT

The Air Force Court of Military Review was correct in ruling that the military judge erred in admitting Pros. Exh. 2. Admission of such a statement clearly was not warranted because the declarant's claimed unavailability had not been adequately established, and, therefore, petitioner's Sixth Amendment right to confrontation was violated.

However, the Court of Review applied the wrong standard in holding that such an error of constitutional dimensions was harmless. This Court in *Chapman v. California*, 386 U.S. 18 (1967) clarified its holding in *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963) at page 24.

> "We, therefore, do no more than adhere to the meaning of our *Fahy* case where we hold, as we now do, that before a federal constitutional error can be held

> harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The Air Force Court of Military Review did not and could not make that declaration. Instead, the Court of Review stated that "the indicia of guilt provided by this evidence are *de minimus* when compared to the other evidence of record . . ." *United States v. Griffin, supra*, at 504. Such a conclusion inherently relies on the assumption that petitioner could have been convicted even without consideration of the statement which was improperly admitted. As the United States Court of Military Appeals has ruled, "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *United States v. Ward*, 1 M.J. 176, 179 (C.M.A. 1975), *citing, Fahy v. Connecticut, supra.*

In making the determination as to the effect of improperly admitted evidence, one must consider the purpose for which the evidence was introduced and the use to which it was put. *United States v. Ward, supra*, at 180. In this instance, the government admitted at trial that the statement of Mrs. Bordoy was the only evidence that a black man pushed a white woman into the motel room. As such, this statement was evidence of a material fact and was the most probative evidence on this point. The statement of Mrs. Bordoy produced direct evidence of physical contact between petitioner and the victim of the alleged rape. Such evidence is incriminating in and of itself in that it connects petitioner with the use of physical force to prevent A1C Hurst from leaving the room. As the trial counsel argued in his closing statement, A1C Hurst went to the door tried to get out, but she was pulled back in by petitioner and then the screaming started. Thus, the

members were specifically requested to consider the statement of Mrs. Bordoy as direct evidence that petitioner physically prevented A1C Hurst from leaving the motel room immediately before the screaming started. Not only is it likely that the members considered the statement for this purpose, it is also likely that they inferred that the resultant act of intercourse was similarly forced upon A1C Hurst rather than being voluntarily consented to. Thus, this statement was used to support an essential element of the offense of rape and it cannot be deemed to be harmless.

Not only was the statement of Mrs. Bordoy used as direct evidence of petitioner's use of physical force against A1C Hurst, it also was used to corroborate her testimony, thereby enhancing the credibility of A1C Hurst. The issue of consent was the central issue in this case and was strongly contested. In a situation such as this, the credibility of the accused and the alleged victim of a rape are the pivotal issues. Thus, any evidence which makes one version more likely or probable than the other is relevant and material.

When relevant and persuasive evidence is improperly introduced in close cases such as in this instance, reliance on the harmless error rule works unfair results because there is a reasonable possibility that the evidence might have contributed to the conviction. *Chapman v. California, supra.* As this Court has stated on several occasions, "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." *Chapman v. California, supra,* at 23-24, *citing Fahy v. Connecticut, supra.* Petitioner submits that the record does not affirmatively establish that there was no reasonable possibility that the statement of Mrs. Bordoy might have contributed to petitioner's conviction. Rather, the record reveals that the admission and use of Mrs. Bordoy's statement was, in all likelihood, relied upon by members. The trial counsel specifically argued that Mrs. Bordoy's statement was independent and convincing

evidence that petitioner used physical force to prevent A1C Hurst from leaving the motel room, and also that the statement corroborated the testimony of Hurst. Either of these two uses creates the presumption that the evidence contributed to the conviction and it cannot be deemed to be harmless beyond a reasonable doubt. *United States v. Ward, supra*, at 180-181.

This case is distinguishable from *Rose v. Clarke*, 478 U.S. 570 (1986) and *Pope v. Illinois*, ____ U.S. ____, 95 L.Ed.2d 439, 107 S.Ct. 1918 (1987). In *Rose, supra*, the court found harmless error because the element of intent at issue there was apparent to any "rational" jury by the fact of commission of the injury. In *Pope, supra*, the court remanded for harmless error analysis where a jury was misinstructed that community standards rather than a reasonable man standard would be utilized to exclude redeeming social value as a defense to obscenity prosecutions. The instructional error thus dealt with a subjective prong of the obscenity test which the Illinois Court of Appeals might be able to resolve by reference to other evidence and analysis without necessity of a retrial.

Both of these cited cases differ from the error thrust on petitioner herein. Mrs. Bordoy's statement was a factual matter adding weight and support to the alleged victim's side of a one-on-one swearing contest. It is not intent inferable from other facts or a rational man standard appliable on appellate review to properly admitted facts. A significant portion of the prosecution's case, from a factual perspective, was introduced through this error of admission. Harmless error analysis is inappropriate to this factual sufficiency issue in light of the critical and central nature of the evidence on the consensual intercourse issue.

Finally, Mrs. Bordoy's out-of-court statement contained her opinion on the ultimate issue of the case when she opined ". . . I thought the girl was being raped . . ."

Such an opinion is a legal conclusion which did not assist the triers of fact in their determination. Rather, the admission of such conclusions invades the province of the members by depriving the fact-finder of the opportunity to draw its own inferences and conclusions rather than accepting those of the witness. Saltzburg, Schinasi and Schleuter, *Military Rules of Evidence Manual*, p. 322 (Michie, 1981). This opinion compounded the prejudice caused by the erroneous admission of the statement of Mrs. Bordoy.

CONCLUSION

The decisions of the Air Force Court of Military Review and the United States Court of Military Appeals grant that admission of the statement in question was error but then deny corrective action. Mrs. Bordoy was not a military witness in this case and the trial of this case did not take place in a foreign country or during any wartime exigencies. In short, there was no military necessity which required this trial to be completed prior to Mrs. Bordoy's expected return to the local area. Characterization of this error as harmless, given its status as the corroborating evidence of the victim's version of this one-on-one confrontation, is contrary to the cited civilian caselaw. Thus, a divergence of view on this question of harmless error exists between the military courts and civilian courts. Since no military necessity exists justifying such a difference, the question should be resolved at this Court.

WHEREFORE, appellant prays for a grant of certiorari to review the decision of the United States Court of Military Appeals in this case.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 53,855
ACM 24752

UNITED STATES, APPELLEE

v.

JAMES GRIFFIN, TECHNICAL SERGEANT,
U.S. AIR FORCE, APPELLANT

March 7, 1988

Accused, a technical sergeant in the United States Air Force, was convicted by general court-martial convened at McChord Air Force Base, Washington, Robert G. Gibson, Jr., J., of rape and he appealed. The Court of Military Review affirmed, 21 M.J. 501. The United States Court of Military Appeals, Cox, J., held that it was not error for court, with accused's consent, to instruct members on effect of punitive discharge on accused's eligibility for retirement benefits.

Affirmed.

Everett, Chief Judge, filed an opinion concurring in the result.

For Appellant: *William J. Holmes, Esq.* (argued); *Colonel Leo L. Sergi, Major Charles E. Ambrose, Jr., Captain Karen McCoy.* USAFR (on brief).

For Appellee: *Lieutenant Colonel Robert E. Giovagnoni* (argued); *Major Joseph S. Kistler* (on brief); *Colonel Kenneth R. Rengert* and *Colonel Joe R. Lamport.*

OPINION OF THE COURT

COX, Judge:

In September 1984, appellant was tried by a general court-martial convened at McChord Air Force Base, Washington. The court was composed of officer (commissioned) and enlisted (noncommissioned officer) personnel. Appellant, a Technical Sergeant (E-6), was charged with raping an Airman First Class (E-3) servicewoman, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. Despite his not guilty pleas, he was convicted and sentenced to be confined for 5 years and dishonorably discharged from the service. The convening authority approved the sentence as adjudged, and the Court of Military Review affirmed. 21 M.J. 501 (1985).

In his petition to this Court, appellant has asked us to determine if the military judge committed prejudicial error when he instructed the court members about appellant's eligibility for retirement benefits. We hold that the judge's instructions were not prejudicially erroneous, based on the facts and cirumstances present here.

Sometime prior to the date of the offense, appellant submitted the paperwork required to allow him to retire from active duty in the Air Force. When the offense occurred, he was on terminal leave, awaiting transportation to his home in another state. During an *in camera* hearing [Art. 39(a), UCMJ, 10 U.S.C. § 839(a)] on sentencing instructions, trial counsel requested that the court members be instructed on the effect a sentence to reduction in grade without a punitive discharge would have on retirement benefits. After discussing applicability of the instruction to the case and without any objection from the defense, the military judge agreed and advised the members as follows:

> An enlisted member who is retirement eligible at the time of sentencing and who is reduced in grade

but not sentenced to a punitive discharge will, if permitted to retire, retire at the grade to which reduced but will be paid at the higher grade.

During deliberations, the court members asked the judge several questions concerning retirement benefits. Specifically, they wanted to know if a punitive discharge would cause forfeiture of all of appellant's retirement benefits. They also wished to know:

1. What effect would a reduction in grade have on his retirement benefits?
2. When would a punitive discharge become effective?
3. What benefits would appellant's dependents be entitled to if he were confined?
4. How long would dependent entitlement exist?
5. Would retirement occur if appellant were not punitively discharged?

Although the military judge attempted to answer some of the questions, he ultimately instructed them that: decisions concerning appellant's retirement status would be made by the Secretary of the Air Force; the members should sentence appellant based on the offense committed and the instructions given; and the members could recommend that the convening authority grant appellant clemency. Defense counsel did not object to any of the members' questions or to the judge's answers.

The general rule concerning collateral consequences of a sentence is that "courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." *United States v. Quesinberry,* 12 U.S.C.M.A. 609, 612, 31 C.M.R. 195, 198 (1962). We see no need to relax this rule today.

Obviously, a military judge will be confronted from time-to-time with inquiries from court members regarding collateral consequences of particular sentences, and an appropriate reply ordinarily is to reaffirm the idea that collateral consequences are not germane. On the other hand, it is certainly not error for the judge to answer the members' question *if an accused agrees.* Military judges are cautioned, however, to be particularly careful in those situations where their answers to questions from members are not clear.

Thus, the fact that the military judge instructed the members about the effect of the adjudged sentence on appellant's retirement benefits does not mandate reversal.

First, in reality, the impact of an adjudged punishment on the benefits due an accused who is eligible to retire is often the single-most important sentencing matter to that accused and the sentencing authority. Thus, it is only in a theoretical sense that the effect a punitive discharge has on retirement benefits can be labeled collateral. Moreover, the impact on benefits – whatever it may be – can only be a direct and proximate consequence of the sentence.

Second, the instruction here was not given *sua sponte,* but at the request of trial counsel. The military judge discussed the instruction with defense counsel and specifically asked if there was any objection. None was made.

Third, during deliberations and as noted herein, the members asked the judge questions about retirement benefits, and, again, no objection was made to the judge's responses.

Lastly, during argument in mitigation, defense counsel pleaded, as follows, for the members not to punitively

discharge appellant because of the consequential loss of retirement benefits:

> [A] dream may be shattered forever and irreparably if he be punitively discharged from the Air Force—a punishment grossly beyond proportions of an offense committed under such circumstances and by a man of his record and demonstrated character.
>
> And so I beseech you . . . that you not punitively discharge this man and impose a forfeiture of his retirement forever.

In any event, absent timely objection, an error in sentencing instructions is waived unless such error rises to the level of "plain error." R.C.M. 1005(f), Manual for Courts-Martial, United States, 1984. As we have recently reiterated:

> In order to constitute plain error, the error must not only be both obvious and substantial, it must also have "had an unfair prejudicial impact on the jury's deliberations." [Citation omitted.] The plain error doctrine . . . "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." [Citation omitted.]

United States v. Fisher, 21 M.J. 327, 328-29 (C.M.A.1986).

In sum, we are satisfied that neither the military judge's instructions to the court members nor his responses to their questions constituted such error. Thus, there is no error which "materially prejudices the substantial rights of" appellant. Art. 59(a), UCMJ, 10 U.S.C. § 859(a).

The decision of the United States Air Force Court of Military Review is affirmed.

Judge SULLIVAN concurs.

EVERETT, Chief Judge (concurring in the result):

In my view, it is quite appropriate for the sentencing authority—whether court members or military judge—to consider the collateral consequences of various sentencing alternatives. Therefore, it is permissible for a judge to instruct on those consequences, either *sua sponte* or at the request of the parties or of the members. Likewise, it is permissible for the members to seek instruction in this regard.

Unfortunately, however, the collateral consequences of a sentence—or even of a conviction—cannot always be foreseen. Moreover, military judge is less likely to be informed as to collateral, than as to direct, consequences. Thus, for practical reasons and in the exercise of his sound discretion, a military judge is entitled to limit the scope of the advice he provides—as the judge attempted to do here.

If the military judge erred in his instructions, his error was waived by the defense's lack of objection. No reason exists to grant relief from this waiver, since the failure to object apparently reflected a tactical choice by defense counsel, rather than oversight or incompetence on his part.

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 24752

UNITED STATES

v.

TECHNICAL SERGEANT JAMES GRIFFIN, FR 255-64-9454
UNITED STATES AIR FORCE

SEP 5 1985

Sentence adjudged 21 September 1984 by GCM convened at McChord Air Force Base, Washington. Military Judge: Robert G. Gibson, Jr.

Approved sentence: Dishonorable discharge and confinement for five (5) years.

Appellate Counsel for the Accused: Colonel Leo L. Sergi, Lieutenant Colonel Patrick C. Sweeney and Captain Bruce T. Brown.

Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Colonel Andrew J. Adams, Jr., and Captain S. Kistler.

Before

HODGSON, FORAY and MURDOCK
Appellate Military Judges

DECISION

HODGSON, Chief Judge:

On 8 July 1984, the appellant and Airman First Class H met in the passenger terminal at McChord Air Force Base, Washington, where both were on leave seeking space

available transportation back to their units. This casual meeting progressed to the point where the appellant suggested they split the cost of a motel room where they could clean up and rest. He indicated his flight was due to leave at 2300 hours that night and he would not be in the room after that. This was agreeable to Airman H and she accompanied him to a motel near the base. After the appellant obtained a room she gave him her share of the cost, and left for the evening—she returned at approximately 2300 hours and found the appellant still there and who then announced he was staying until morning. Airman H did not consider this arrangement satisfactory and left the room to call a taxi. She returned to the room to get her luggage and while there the taxi arrived. When the appellant told the taxi driver it would not be needed she became frightened, started to scream and attempted to leave the room. The appellant, who was dressed in his underwear, blocked the door and forced her onto the bed, took her pants off and had sexual intercourse with her.

Later, Airman H got away and ran out the door. At that time she was, according to a male witness, "hollering for help and that she had been raped." The taxi driver whom she had called for transportation and who the appellant turned away at the room door, heard the screams and called the police. Other guests staying at the motel heard the screams and a woman's voice saying "Please stop," "It hurts," and "Don't." One witness, a woman staying at the motel, testified that Airman H ran to her crying and said, "Help me—I've been raped." Subsequently, the appellant was arrested by the local police department and later released on $5,000.00 bail. For reasons not stated in the record the civilian authorities declined to prosecute the incident.

At trial the appellant admitted sexual intercourse with Airman H, but contended she consented to the act. He

testified she returned to the room that evening crying and upset over something that occurred earlier. While he was comforting her a taxi arrived and he told the driver it would not be needed. At this point she started screaming so he "grabbed her," they struggled and fell onto the bed with him on top. She quit crying and apologized for making him miss his flight. While the two of them were lying on the bed, he removed her pants and had sexual intercourse with her. Additionally, the appellant offered evidence as to his truthfulness and reputation for being law abiding.

In a trial with enlisted members, the appellant was convicted of rape and sentenced to a dishonorable discharge and five years confinement.

I

The appellant argues that while both he and Airman H were Air Force members, the alleged offense occurred off-base, and therefore the court-martial was without jurisdiction to try him as the incident was not "service-connected." *O'Callahan v. Parker,* 395 U.S. 258 (1969); *Relford v. Commandant,* 401 U.S. 355 (1971); *see also United States v. Hudlund,* 2 M.J. 11 (C.M.A.1976).

Of course, a mere off-base occurrence does not deprive a court-martial of jurisdiction over a crime if the conduct of the service member which takes place beyond the boundaries of the installation has a significant impact on the Armed Services as an entity. *United States v. Lockwood,* 15 M.J. 1 (C.M.A. 1983); *United States v. Shorte,* 18 M.J. 518 (A.F.C.M.R. 1984), *aff'd.,* ____ M.J. ____ (C.M.A. 1985); *United States v. Wojciechowski,* 19 M.J. 577 (N.M.C.M.R. 1984). Further, such intangibles traditionally associated with the military forces as "reputation" and "morale" have been given renewed emphasis in determining the "service-connection" of off-base offenses. *United States v. Lockwood, supra.*. The "service-connection" re-

quirement is decided on a case-by-case, offense-by-offense basis and is a factual determination. *United States v. Roa,* ____ M.J. ____ (A.F.C.M.R. 1985); *United States v. Shorte, supra.* While court-martial jurisdiction cannot presently be predicated solely on the military status of the parties involved, this circumstance is an important factor to be considered in determining whether the military has a distinct interest in the prosecution of the case overriding the interest of the civilian community. *United States v. Shorte, supra; United States v. Kyles,* 20 M.J. 571 (N.M.C.M.R. 1985).

In the case at hand, the appellant and the victim were Air Force members who became acquainted[1] while on a military installation. The victim testified that the appellant's status as a non-commissioned officer was a significant factor in her agreeing to the room-sharing arrangement. We have repeatedly held that maintaining discipline within the Armed Services is a unique military function. *United States v. Benedict,* ____ M.J. ____ (A.F.C.M.R. 1985); *United States v. Heering,* ____ M.J. ____ (A.F.C.M.R. 1985). For unknown reasons the State of Washington chose not to pursue the incident. In our view, the rape of one service member by another, no matter where it takes place, has a clear and recognizable impact on the morale, reputation and integrity of the Armed Forces. We attach meaningful weight to the appellant's status as a non-commissioned officer, that he and the victim met on base and from there went to the site of the crime, and the crime's proximity to a military installation. *United States v. Lockwood, supra,* at 10. All of these circumstances make a compelling argument that the interest

[1] The appellant was in uniform at the time of their meeting.

of the military far outweighs that of the civilian community so as to justify trial by court-martial. *United States v. Heering, supra; United States v. Benedict, supra; United States v. Roa, supra; United States v. Shorte, supra; United States v. Hollis,* 16 M.J. 954 (A.F.C.M.R. 1984); *see also United States v. Wilson,* ____ M.J. ____ (N.M.C.M.R. 1985).

II

At trial the prosecution successfully convinced the trial judge, over objection of the defense counsel, that the statement of Mrs. Kwang Sun Bordoy, a guest at the motel where the alleged rape occurred, was admissible under the residual hearsay exception of Mil. R. Evid. 804(b)(5). In the challenged statement Mrs. Bordoy indicated she heard screams coming from a room almost directly across from hers and "saw a black man push a white woman into the [room]."

We have consistently held that statements admitted under the residual hearsay exception do not violate the confrontation clause of the Sixth Amendment if the express requirements of the rule are met. *United States v. Barror*, 20 M.J. 501 (A.F.C.M.R. 1985). We have also noted that the rule's focus is narrow and meant to be invoked sparingly and in rare circumstances. *United States v. Harris*, 18 M.J. 809 (A.F.C.M.R. 1984). In *Barror, supra*, we observed that the residual hearsay exception finds its greatest application in trials where children are the victims of alleged sexual abuse. While the rule's use is not limited to that area, the situations in which it may be be invoked must be exceptional. Accordingly, the requirements of the rule are to be strictly construed.

The declarant of the challenged statement is a Korean national and the wife of an Air Force member. At the time of trial she was in Korea visiting her mother. When the

declarant was to return to the United States is unclear. To show that the declarant was "unavailable" as contemplated by Mil. R. Evid. 804(b), the trial counsel established that the wife of an Office of Special Investigations (OSI) agent who spoke Korean attempted to contact her on behalf of the Government by telephone, but was unable to do so. The OSI agent admitted he did not seek the assistance of his counterpart in Korea in an effort to locate the witness. One unsuccessful telephone call appears to be the sum total of the Government's attempt to find Mrs. Bordoy.

In our opinion the Government did not make a reasonable effort to secure Mrs. Bordoy's presence at trial. Mil. R. Evid. 804(a)(5). Had the prosecution concluded her testimony was needed a deposition was an option. Article 49, U.C.M.J.; R.C.M. 702; *see United States v. Amerine*, 17 M.J. 947 (1984). Inconvenience in obtaining a witness is not an acceptable substitute for that person's unavailability. *Cf. United States v. Hubbard*, 18 M.J. 687 (A.C.M.R. 1984) (witness held unavailable on a showing of: [1] witness absent without leave two weeks before trial; [2] CID notified of absence and local "hangouts" watched; [3] witness's parents contacted; and [4] local police at parents' location also searched for the witness). On the above facts we hold that the trial judge abused his discretion in admitting Mrs. Bordoy's statement. *Accord United States v. Crayton*, 17 M.J. 932 (A.F.C.M.R. 1984). However, the indicia of guilt provided by this evidence are *de miminis* when compared to the other evidence of record which included the appellant's judicial admission that he engaged in sexual intercourse with the victim albeit, according to him, with her consent. We are satisfied that the inadmissible statement was harmless error and did not contribute to the appellant's conviction.

III

The appellant contends he is entitled to 76 days administrative credit toward his sentence as the result of pretrial confinement rather than the 75 days credit he was given. Appellant government counsel concede that he is entitled to an additional day's credit and we agree. The appellant will be given one day administrative credit toward his confinement in addition to the credit already received. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

IV

The remaining assigned errors[2] are resolved against the appellant. *United States v. Rogan*, 19 M.J. 646 (A.F.C.M.R. 1984); *United States v. Shea*, 17 M.J. 966 (A.F.C.M.R. 1984). The evidence of guilt in this case is overwhelming. We are convinced beyond a reasonable doubt that the appellant committed the offense alleged. Article 66(c), U.C.M.J. The findings of guilt and the sentence are AFFIRMED.

FORAY, Senior Judge, and MURDOCK, Judge, concur.

OFFICIAL:

/s/ CHARLES L. WILLE
Charles L. Wille
Captain, USAF
Chief Commissioner

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[2] The defense MOTION TO FILE DOCUMENT is GRANTED.

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Supreme Court
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No. 87-1813

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the erroneous admission into evidence of the hearsay statement of a declarant who did not testify at trial was harmless error.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 25 M.J. 423. The opinion of the Air Force Court of Military Review (Pet. App. 7a-13a) is reported at 21 M.J. 501.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 7, 1988. The petition for a writ of certiorari was filed on May 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial at McChord Air Force Base in Washington, petitioner, a member of the United States Air Force, was convicted of rape, in violation of Article 120 of the Uniform Code of Military Justice

(UCMJ), 10 U.S.C. 920. He was sentenced to confinement for five years and a dishonorable discharge. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 7a-13a). The Court of Military Appeals affirmed (*id.* at 1a-6a).

1. As summarized by the Air Force Court of Military Review (Pet. App. 7a-9a), the evidence at trial showed that petitioner and the victim, Airman First Class Sheree Hurst, met in the passenger terminal at McChord Air Force Base, where both were awaiting military transportation to other locations (Tr. 248, 250, 614). Both were anticipating lengthy waits, and there were no rooms available at the base, so petitioner suggested that they split the cost of a motel room, where they could rest and freshen up (Tr. 253). Hurst at first said nothing, but later agreed to an arrangement where petitioner would use the room until about 11 p.m. that night, when he said his flight was expected to leave,[1] and Hurst would have the room until the following morning (Tr. 253, 307). They then took a shuttle bus to the Fort Lewis Motel, which was located a short distance from McChord (Tr. 254). Hurst was still reluctant to share the room, but petitioner persuaded her to do so (Tr. 255, 309-310).

Petitioner obtained a room and Hurst gave him her half of the room rent (Tr. 255). Petitioner then left the room to purchase some liquor, and Hurst showered and changed clothes (Tr. 257, 313). After petitioner returned, she talked with petitioner for a while, they each had a drink, and Hurst then went to a bar for several hours, returning after she believed petitioner had left (Tr. 256-263,

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[1] In fact, petitioner knew at the time that his flight would not leave before the following morning because of repairs on the aircraft (Tr. 659-660).

314-348). When she entered the room, petitioner was still there, in the bed under the covers. He told her that his flight was not leaving until morning and that he would be staying the entire night (Tr. 264-265). Hurst did not consider that arrangement satisfactory, so she went outside and called for a taxi from a telephone at the motel (Tr. 265-266). When the taxi arrived a few minutes later, petitioner went out to meet the taxi and told the driver that the taxi was no longer needed (Tr. 267, 354, 523). Hurst became frightened and screamed to the driver not to leave (*ibid.*). As she attempted to leave the motel room, petitioner pushed her away from the door, closed it, and blocked it with his body (Tr. 267, 359-360). A struggle followed, in which petitioner grabbed Hurst, shook her, and pushed her onto the bed. She attempted to ward off his advances by screaming and by hitting and pushing him, but he eventually overpowered her, removed her clothes, and raped her (Tr. 267-270, 361-362, 363-385). Later, while petitioner was at the sink, Hurst escaped from the room and ran toward other motel guests, who had been drawn outside by the commotion. She was highly agitated, pleading for help and exclaiming that she had been raped (Tr. 270, 387-388, 454, 468-469, 482, 486, 525). She then went over to the taxicab, which had remained in the parking lot, and waited for the police, who arrived five or ten minutes later (Tr. 271, 415-416, 453, 468-469, 524).

Several witnesses testified that they heard screams and the sounds of a struggle coming out of the room occupied by petitioner and Hurst. Army Sergeant Edmundo Nigaglioni, a motel guest, testified that he heard screams coming from the room, and a woman saying "I won't do it—I won't do it" (Tr. 477-478). DiAnn Solomon, another guest, testified to hearing the screams for about 15 minutes and a "girl yelling for help, to please stop, and that it hurt" (Tr. 481). She also heard the sound of things

being thrown about the room (*ibid.*). Solomon walked outside her room, and shortly thereafter the victim came running up to her, grabbed her arms, and pleaded for help in a frightened, upset manner (Tr. 481-482). Army Private Jose Calderon, Ms. Solomon's fiance, also testified that he heard screams for approximately 15 minutes and that he heard a woman yelling "please stop," "it hurts," and "don't" (Tr. 485). Gregory Webb, the taxicab driver who was dismissed by petitioner, testified that he heard the victim screaming "don't leave me here" or "help me" and that he heard screams, punctuated by sounds of things breaking or someone hitting a wall (Tr. 523-524, 528-530). Webb was prohibited by company policy from rendering assistance inside the motel room (Tr. 524), but he told his dispatcher to call the police, and he remained in the motel parking lot (*ibid.*). He heard more screams from the room for 10 or 15 minutes, then a 5 to 10 minute lull, after which the victim ran out of the room screaming and shaking (Tr. 525, 529-531). Another cab driver who arrived on the scene gave similar testimony (Tr. 468-469, 475).

In addition to the testimony of those witnesses, the prosecution offered a written statement executed by another motel guest, Mrs. Kwang Sun Bordoy, on July 10, 1984, two days after the rape (Tr. 50; PX 2).[2] Over defense

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[2] Bordoy's statement said in pertinent part (PX 2):

> I arrived at McChord AFB, WA, at approximately 1 p.m., 8 Jul 84, with my husband and daughter. We are on leave awaiting air transportation to Korea.
>
> Sometime after I put my baby to bed at approximately 10:30 the night of 8 Jul 84, I heard a scream from the apartment area. I then saw a black man push a white woman into apartment 17. I then went to my husband and told him what I saw. I told him I thought the girl was being raped. She kept screaming for about 10

objection, the trial judge admitted that statement under Mil. R. Evid. 804(b)(5), the so-called residual exception to the hearsay rule for an unavailable witness (Tr. 89).

2. At trial petitioner admitted engaging in sexual intercourse with Hurst but contended that it was consensual (Tr. 645-648, 651, 658). He testified that when she returned to the room late that night, she was upset over something that apparently had occurred earlier while she was out (Tr. 638). He admitted that she was screaming; that he prevented her from leaving the room after he dismissed the taxi; and that he grabbed her, shook her, and forced her to the bed (Tr. 640-652). He attributed Hurst's screaming to her emotional distress over whatever had previously upset her, and he justified his actions in grabbing, shaking, and forcing her to the bed on the ground that they were his efforts to calm her down and find out what was wrong (Tr. 640-644). He testified that Hurst calmed down after they were on the bed, that they engaged in consensual intercourse, and that afterwards she screamed again and ran out of the room (Tr. 645-650).

3. The Air Force Court of Military Review ruled that the admission of Bordoy's statement was error, because the prosecution had not shown that Bordoy was unavailable within the meaning of Mil. R. Evid. 804(b)(5). Pet. App. 12a. Nonetheless, that court held that the error was harmless, given the "overwhelming" proof of petitioner's guilt. *Id.* at 13a. Petitioner sought review of that finding in the Court of Military Appeals, but the court

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minutes or so. She finally came running out of the apartment and went over to a taxi driver. Shortly after that the police arrived.

This all happened at the Ft. Lewis Motel, Tacoma, WA. We were staying in room 6. Room 17 is almost directly across from our room.

declined to grant review of that issue. It affirmed petitioner's conviction after considering another issue. *Id.* at 1a-6a.

ARGUMENT

Petitioner contends that the Air Force Court of Military Review incorrectly found that the admission of Bordoy's statement was harmless.[3] That fact-bound claim does not merit review by this Court.

1. Petitioner argues (Pet. 4-5) that the court of military review applied the wrong standard in finding the error harmless. He claims that the court of review applied a "de minimis standard," rather than the supposedly more rigorous harmless error standard adopted in *Chapman* v. *California*, 386 U.S. 18 (1967). That claim lacks merit.

The erroneous admission of evidence in violation of the Confrontation Clause is harmless if, in light of all the evidence in the case, there is no reasonable possibility that the erroneously admitted evidence contributed to the verdict. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986). The court of military review implicitly but correctly applied that standard. The court found (Pet. App. 12a) that the marginal effect of Bordoy's statement on the proof of petitioner's guilt was de minimis, which is simply another way of stating the *Chapman* standard. Moreover, a court of military review must independently review the record

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[3] Petitioner also asserts (Pet. i, 7) that a harmless error analysis is inappropriate because of the seriousness of the error. He cites no case to support that proposition, and we know of none. This Court has consistently applied a harmless error analysis to Confrontation Clause violations and has rejected the call for a rule of per se reversal. *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986); *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973); *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969).

and be convinced of the correctness of a finding of guilt beyond a reasonable doubt before that finding may be upheld. Art. 66(c), UCMJ, 10 U.S.C. 866(c); *United States* v. *Turner*, 25 M.J. 324, 324-325 (C.M.A. 1987). The court of military review carried out that responsibility in this case after ruling that Bordoy's statement had been erroneously admitted. Pet. App. 13a. In so doing, that court in effect concluded that the error in admitting her statement was harmless beyond a reasonable doubt. The failure on the part of the court of military review to cite this Court's decisions in *Chapman* or *Van Arsdall* is therefore of no significance, because the court's ruling was clearly consistent with the harmless error standard applied by this Court.

2. Petitioner also argues (Pet. 5-7) that the admission of Bordoy's statement was not harmless, because it constituted evidence of an essential element of the crime of rape (*i.e.*, the use of force) and because it tended to corroborate the victim's testimony. That claim is meritless. Bordoy's statement could not have materially affected the verdict, because it was cumulative of the other evidence that was properly before the trier of fact, including petitioner's own admissions at trial, all of which overwhelmingly established his guilt.[4]

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[4] Compare *Brown* v. *United States*, 411 U.S. at 231 (the admission of non-testifying co-defendants' confessions in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968), was harmless in light of their cumulative nature and the overwhelming evidence of guilt properly before the jury); *Schneble* v. *Florida*, 405 U.S. at 430-432 (*Bruton* violation held harmless error where confession at most merely corroborated the accused's confession and there was overwhelming independent evidence of guilt); *Harrington* v. *California*, 395 U.S. at 252-254 (*Bruton* violation held harmless error where co-defendants' confessions were cumulative and the independent evidence of guilt was overwhelming).

The only disputed issue at trial was whether Hurst consented to sexual intercourse with petitioner, and Bordoy's statement could not have had a material effect on the court-martial panel's resolution of that question. Insofar as the statement relates that Hurst was screaming and later ran for help, the statement was merely cumulative of the independent, uncontroverted testimony offered by five prosecution witnesses. In addition, even though petitioner did not testify that he used force to push Hurst back into the room, he did admit that he used force to subdue Hurst once she was inside the room in order, he claimed, to find out what was bothering her. Accordingly, the inference that petitioner used force against Hurst was inescapable, from petitioner's own testimony if from nowhere else.[5]

Moreover, the independent evidence properly before the court-martial panel overwhelmingly established petitioner's guilt. In addition to the victim's strong and unwavering testimony, there was uncontroverted evidence that petitioner struggled with Hurst; that she tried to get away; that petitioner prevented her from doing so; that petitioner forced Hurst to the bed; that Hurst was screaming "I won't do it," "please stop," "it hurts," and "don't,"

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[5] Petitioner asserts (Pet. 7-8) that Bordoy's statement that "I thought the girl was being raped" compounded the prejudice he suffered, since that statement constituted an improper "legal conclusion." The full text of Bordoy's statement on that point was "I told him [her husband] I thought the girl was being raped" (PX 2). Rather than stating a legal conclusion, that statement merely related what she told her husband at the time the events were occurring. Therefore, the statement, had she testified, could arguably have been admitted either to explain why she took notice of the events and continued watching for ten or more minutes, or as a "present sense impression." In any event, it is unlikely that the court-martial panel found petitioner guilty of rape merely because Bordoy had that impression.

throughout the ordeal; and that Hurst ran from the room crying and screaming for help. In light of that evidence, petitioner's claim that Hurst consented to intercourse was simply not credible, and it was not made any less credible by the erroneous admission of Bordoy's statement. The error in admitting the statement was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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